Marappan a/l Muthusamy v R Sivam a/l Ramasamy

COURT OF APPEAL (PUTRAJAYA) — CIVL APPEAL NO W-02–2412–10 OF 2012
CLEMENT SKINNER, LIM YEE LAN AND ROHANA YUSUF JJCA
24 JUNE 2013

Contract — Sale and purchase agreement — Fraud and forgery — Allegation of — Genuineness of sale and purchase agreement and deed of assignment contested by defendant — Unexplained discrepancies and irregularities leading to an inference against their genuineness — Plaintiff to prove genuineness of document before burden shifts to defendant to prove fraud or forgery — Whether adverse inference invoked against plaintiff for failure of plaintiff to call solicitor who prepared the documents — Evidence Act 1950 ss 101, 103 & 114(g)

Evidence — Burden of proof — Fraud and forgery — Allegation of — Whether sale and purchase transaction tainted by fraud and forgery — Whether plaintiff had prove genuineness of document before burden & shifted to defendant to prove fraud or forgery — Evidence Act 1950 ss 101 & 103

Evidence — Presumptions — Adverse inference under s 114(g) of the Evidence Act 1950 — Allegation of fraud and forgery in sale and purchase agreement and deed of assignment — Whether adverse inference invoked against plaintiff for failure of plaintiff to call solicitor who prepared documents

The appellant/defendant together with five others purchased a two-storey shop house ('the property') with each of them having a 1/6 share. The property was registered under the appellant's name as a trustee pursuant to a trust deed dated 7 June 1993. The appellant was holding 5/6 shares in trust for the benefit of the other five co-owners. A sale and purchase agreement ('SPA1') was made on 13 March 1996 where Nallayan (one of the co-owners) acquired the shares of four of the co-owners making his total share in the property to be 5/6. At the same time there was also a deed of assignment ('DOA1') (exh D3) purportedly entered by Nallayan and the four co-owners. Another sale and purchase agreement ('SPA2') (exh D4) was purportedly entered between Nallayan and the respondent/plaintiff dated 18 January 2000 where Nallayan purportedly sold all his 5/6 shares. A deed of assignment ('DOA2') dated 18 January 2000 (exh P20) was purportedly executed. The genuineness of exhs D4 and P20 was seriously contested. Pursuant to a settlement agreement, the appellant had agreed to sell his 1/6 share in the property to the respondent. The appellant was alleged to have failed to honour the settlement agreement. The respondent thus

commenced the present claim against the appellant. The issue arising for consideration was whether exhs D3, D4 and P20 were true transactions and valid in law. The learned JC held that the appellant failed to prove fraud and or forgery in exhs D3, D4 and P20 and hence, she accepted these documents to be genuine, representing the true transactions between parties. By reason thereof, the learned JC granted declarations that the respondent was the beneficial owner of a 5/6 share in the property and that the appellant transfer his 1/6 share in the property to the respondent. The appellant brought the present appeal against this decision on the grounds that the learned JC misdirected herself in her finding that the appellant ought to have proven fraud beyond reasonable doubt when the respondent failed to discharge the burden of proving to the court the genuineness of the three exhibits in establishing his claim.

Held, allowing the appeal with costs of RM75,000:

(1) It is trite law as provided under ss 101 and 103 of the Evidence Act 1950 ('Act') that whoever desires any court to give judgment in respect of any legal right must prove that those facts he asserts in support of such right exist. In view of the challenges by the appellant on the existence and genuineness of the three exhibits in the present case, it was incumbent on the respondent to prove exhs D3, D4 and P20 were true and genuine. He had to do so before he could assert any right arising from the alleged transactions vide these documents. The JC misdirected herself when she shifted the burden of proof on the appellant before ensuring that the respondent discharged his burden to prove that the exhibits in question existed and were genuine (see para 11).

(2) The burden to establish fraud by the appellant had not arisen in the circumstances of this case because the respondent had not discharged his burden to establish his case premised on the exhs D3, D4 and P20. These exhibits, which form the basis of the respondent's claim, were too tainted with unexplained discrepancies and irregularities that could lead to an inference that their genuineness may be in doubt (see para 13).

(3) The failure of the respondent to call the solicitor who prepared the documents to testify on these documents despite informing the appellant in writing that he would be present to testify, attracted the invocation of s 114(g) of the Act against the respondent. There was no explanation being offered by the respondent as to his failure to call this material witness. It was imperative upon the respondent to call the material witnesses he had undertaken to do in writing, and the failure to do so without explanation could lead to an adverse inference against the respondent. Hence, the legal inference under s 114(g) applied against the respondent (see para 28).

(4) Nallayan was adjudicated a bankrupt on 13 August 2002. On 25 July 2006 Nallayan entered into the settlement agreement where the

appellant agreed to sell his 1/6 share to the respondent. It was peculiar that Nallayan could have entered into a settlement agreement considering his lack of capacity as an undischarged bankrupt (see para 30).

(5) The respondent had failed to establish on the balance of probabilities that the three exhibits in question were all genuine and they truly represented the true transaction between parties (see para 34).

[Bahasa Malaysia summary

Perayu/defendan bersama dengan lima yang lain telah membeli sebuah rumah kedai dua tingkat (hartanah tersebut) dengan setiap seorang mendapat 1/6 bahagian. Hartanah itu telah didaftarkan atas nama perayu sebagai pemegang amanah menurut surat ikatan amanah bertarikh 7 Jun 1993. Perayu telah memegang 5/6 bahagian dalam amanah bagi kepentingan kelima-lima pemilik yang lain. Satu perjanjian jual beli ('SPA1') telah dibuat pada 13 Mac 1996 yang mana Nallayan (salah satu pemilik) telah memperoleh bahagian keempat-empat pemilik dan membuatkan jumlah bahagiannya dalam hartanah menjadi 5/6. Pada masa yang sama terdapat juga surat ikatan penyerahan hak ('DOA1') (eksh D3) yang dimeterai oleh Nallayan dan keempat-empat pemilik yang lain. Satu lagi perjanjian jual beli ('SPA2') (eksh D4) telah dimeterai antara Nallayan dan responden/plaintif bertarikh 18 Januari 2000 yang mana Nallayan telah menjual kesemua 5/6 bahagiannya. Satu surat ikatan penyerahan hak ('DOA2') bertarikh 18 Januari 2000 (eksh P20) telah ditandatangani. Keesahan eksh D4 and P20 ditentang dengan serius. Menurut perjanjian penyelesaian, perayu bersetuju menjual 1/6 bahagiannya dalam hartanah tersebut kepada responden. Perayu didakwa telah gagal untuk mematuhi perjanjian penyelesaian. Responden justeru memulakan tuntutan ini terhadap perayu. Isu yang timbul untuk penentuan adalah sama ada eksh D3, D4 dan P20 adalah transaksi sebenar dan sah di sisi undang-undang. PK yang bijaksana memutuskan bahawa perayu telah gagal untuk membuktikan fraud dan pemalsuan di dalam ekh D3, D4 dan P20 dan oleh itu, beliau menerima dokumen-dokumen tersebut sebagai tulen, menggambarkan transaksi sebenar antara pihak-pihak. Disebabkan itu, PK yang bijaksana memberikan deklarasi-deklarasi bahawa responden merupakan pemilik benefisial 5/6 bahagian di dalam hartanah dan bahawa perayu telah memindah milik 1/6 bahagiannya di dalam hartanah kepada responden. Perayu telah membuat rayuan ini terhadap keputusan ini atas dasar bahawa PK yang bijaksana telah salah arah di dalam dapatannya bahawa perayu seharusnya membuktikan fraud melampaui keraguan munasabah apabila responden gagal untuk melepaskan beban pembuktian kepada mahkamah akan keesahan ketiga-tiga ekhsibit dalam membentuk tuntutannya.

Diputuskan, membenarkan tuntutan dengan kos sebanyak RM75,000:

(1) Adalah menjadi undang-undang seperti yang diperuntukkan di bawah

ss 101 dan 103 Akta Keterangan 1950 ('Akta') bahawa sesiapa yang ingin sebarang mahkamah untuk memberikan penghakiman berkenaan dengan apa-apa hak perundangan hendaklah membuktikan bahawa kesemua fakta yang ditegaskan dalam menyokong hak tersebut wujud. Melihatkan cabaran oleh perayu akan kewujudan dan keesahan ketiga-tiga ekshibit di dalam kes ini, adalah penting bagi responden untuk membuktikan eksh D3, D4 and P20 adalah benar dan tulen. Dia hendaklah melakukan sedemikian sebelum dia menegaskan apa-apa hak yang timbul daripada transaksi-transaksi yang didakwa melalui dokumen-dokumen ini. PK telah tersalah arah apabila beliau mengalihkan beban pembuktian terhadap perayu sebelum memastikan bahawa responden melepaskan bebannya untuk membuktikan bahawa ekshibit-ekshibit yang dipersoalkan wujud dan sememangnya tulen (lihat perenggan 11).

(2) Beban untuk membuktikan fraud oleh perayu tidak timbul di dalam keadaan kes ini kerana responden tidak melepaskan bebannya untuk membuktikan kesnya berdasarkan pada eksh D3, D4 dan P20. Ekshibit-ekshibit ini, yang membentuk asas tuntutan responden, adalah dicemari dengan percanggahan dan penyelewengan yang tidak dapat dijelaskan yang mana boleh membawa kepada inferens bahawa keesahannya adalah diragui (lihat perenggan 13).

(3) Kegagalan responden untuk memanggil peguam yang menyediakan dokumen-dokumen untuk memberi keterangan tentang dokumen-dokumen tersebut meskipun telah memaklumkan perayu secara bertulis bahawa dia akan hadir untuk memberikan keterangan, membangkitkan s 114(g) Akta terhadap responden. Tiada keterangan diberikan oleh responden mengenai kegagalannya untuk memanggil saksi material. Adalah penting bagi responden untuk memanggil saksi-saksi material yang telah diakujanji olehnya untuk berbuat demikian secara bertulis, dan kegagalan untuk berbuat demikian tanpa sebab boleh membawa kepada inferens bertentangan terhadap responden. Oleh itu, inferens perundangan di bawah s 114(g) diguna pakai terhadap responden (lihat perenggan 28).

(4) Nallayan telah dihukum bankrap pada 13 Ogos 2002. Pada 25 Julai 2006 Nallayan telah memeterai perjanjian penyelesaian yang mana perayu bersetuju untuk menjual 1/6 bahagiannya kepada responden. Adalah aneh bahawa Nallayan boleh memeterai perjanjian penyelesaian melihatkan kekurangan kapasitinya sebagai bankrap (lihat perenggan 30).

(5) Responden telah gagal untuk membuktikan atas imbangan kebarangkalian bahawa ketiga-tiga ekshibit yang dipersoalkan adalah kesemuanya tulen dan ianya sebenarnya menggambarkan transaksi sebenar antara pihak-pihak (lihat perenggan 34).]

Notes

For a cause on adverse inference under s 144(g) of the Evidence Act 1950, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2416.

Cases referred to

Caley Ototo Worldwide Sdn Bhd v Sun Wen Long [2009] 9 MLJ 1; [2010] 1 CLJ 725, HC (refd)

Dolomite Readymixed Concrete Sdn Bhd v Zalam Corporation Sdn Bhd & Ors [2012] MLJU 707; [2012] 1 LNS 335, HC (refd)

Jaafar bin Shaari & Anor (suing as administrator of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 4 CLJ 509, SC (folld)

Jauhir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)

Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok [1981] 1 MLJ 139, FC (folld)

Legislation referred to

Evidence Act 1950 ss 101, 103, 114(g)

Appeal from: Suit No S22–22–948 of 2008 (High Court, Kuala Lumpur)

Tan Shee Shia (Joanne Lazaroo with her) (Lazaroo & Assoc) for the appellant. Ling Teck John (Ling Teck John & Co) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] This is an appeal by Marappan a/l Muthusamy ('the appellant') against the decision of the High Court of Malaya at Kuala Lumpur dated 25 September 2012. On 24 June 2013 we heard the appeal which we allowed. We now set out the reasons for our decision.

[2] The appellant together with five others purchased a two storey shop house ('the property') held under HS (D) 49503 Lot PT 429 ('master title') Mukim Setapak, Daerah Kuala Lumpur at a purchase consideration of RM 188,000. Each of them has a 1/6 share in the property, which was registered under the appellant's name as a trustee pursuant to a trust deed dated 7 June 1993. The appellant was holding 5/6 shares in trust for the benefit of the other five co-owners. Under the trust deed the appellant was entitled to collect rental proceeds and for that he must maintain a proper ledger and account.

[3] A sale and purchase agreement ('SPA1') was made on 13 March 1996 where Nallayan (one of the co-owners) acquired the shares of four of the co-owners making his total share in the property to be 5/6. The parties did not dispute this SPA. He had purportedly acquired each share at a price of

RM30,000 amounting to RM120,000 from all the four co-owners. At the same time there is also a deed of assignment ('DOA1') purportedly entered by Nallayan and the four co-owners. The DOA was produced and marked as exh D3. This is one of the documents in contention at the trial.

[4] Another sale and purchase agreement ('SPA2') marked as exh D4 was purportedly entered between Nallayan and one R Sivam a/l Ramasamy ('the respondent') dated 18 January 2000 where Nallayan purportedly sold all his 5/6 shares at a purchase price of RM400,000. A deed of assignment ('DOA2') dated 18 January 2000 marked as exh P20 was also purportedly executed. The genuineness of these two documents, namely, exhs D4 and P20 was seriously contested.

[5] Meanwhile, Nallayan had filed a civil suit vide D5–22–1669 of 2000 against the appellant for failing to furnish any account to co-owners since he became a trustee on 8 September 2000. Pending the suit Nallayan was adjudicated a bankrupt by two receiving and adjudication orders dated 13 August 2002 and 15 January 2003 respectively.

[6] The civil suit was fixed for hearing but parties agreed to an out of court settlement. On 25 July 2006 Nallayan withdrew the suit against the appellant. A settlement agreement was made where the appellant agreed to sell his 1/6 share in the property to the respondent. The appellant was alleged to have failed to honour the settlement agreement.

[7] The respondent who had acquired 5/6 shares vide exhs D4 and P20 filed a claim against the appellant in the current action seeking for a number of reliefs, which were allowed by the learned JC. The appellant's counter claim however was dismissed by the learned JC.

[8] It was agreed by the parties at the trial in the High Court that there were three issues to be determined. They further agreed that if the answers to the three issues were in the affirmative, the respondent would be entitled to the reliefs prayed for in the statement of claim and conversely if the three issues were in the negative, the appellant would be entitled to the reliefs sought in the counter claim. The three issues were these:

(a) whether the deed of assignment dated 13 March 1996 executed between Nallayan a/l Ramasamy and the four co-owners (exh D3) was a true transaction and valid in law and if so, the existence and validity of exh D3 cannot be disputed;

(b) whether the sale and purchase agreement dated 18 January 2000 executed between Nallayan a/l Ramasamy and the respondent (exh D4)

was a true transaction and valid in law and that if so, the existence and validity of exh D4 cannot be disputed; and

(c) whether the deed of assignment dated 18 January 2000 executed between Nallayan a/l Ramasamy and the respondent (exh P20) was a true transaction and valid in law and that if so, the existence and validity of exh P20 cannot be disputed.

[9] In her judgment the learned JC held that the appellant failed to prove fraud and or forgery in exhs D3, D4 and P20 and hence, she accepted these documents to be genuine, representing the true transactions between parties. By reason thereof, the learned JC allowed the following reliefs to the respondent:

(a) a declaration that the respondent is the beneficial owner of a 5/6 share in the property erected on the land held under HS(D) 49503, Lot PT 429, Mukim Setapak, Daerah Kuala Lumpur (the property);

(b) that the appellant as the trustee of the 5/6 share in the property prepares and serves on the respondent the audited accounts pertaining to the rent, monies and profit in respect of the property for the period from 2 March 1993 to 25 September 2012;

(c) that the appellant transfers his 1/6 share in the property to the respondent for consideration (if any) after deducting the profits and/or earnings obtained by the appellant through rental and/or other means by usage of the property for the period from 2 March 1993 to 25 September 2012;

(d) if the appellant refuses to transfer his 1/6 share in the property, then the registrar of the High Court is empowered to allow the transfer of the said 1/6 share to the respondent under the terms of the judgment; and

(e) costs in the sum RM60,000.

[10] Against this decision the appeal was brought before us by the appellant. The appellant's main ground of appeal centred on the existence and truthfulness of the three disputed documents namely, exhs D3, D4 and P20. The main complaint raised by the appellant is that the learned trial JC misdirected herself in her finding that the appellant/defendant ought to have proven fraud beyond reasonable doubt when the respondent/plaintiff failed to discharge the burden of proving to the court the genuineness of all the three exhibits in establishing his claim. We find merits in the grounds raised by the appellant.

[11] It is trite law as provided under ss 101 and 103 of the Evidence Act 1950 that whoever desires any court to give judgment in respect of any legal right must prove that those facts he asserts in support of such right exist. In view of

the challenges by the appellant on the existence and genuineness of the three exhibits in the present case, it is incumbent on the plaintiff/respondent to prove exhs D3, D4 and P20 are true and genuine. He must do so before he can assert any right arising from the alleged transactions vide these documents (see *Jauhir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1, *Dolomite Readymixed Concrete Sdn Bhd v Zalam Corporation Sdn Bhd & Ors* [2012] MLJU 707; [2012] 1 LNS 335).

[12] In *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok* [1981] 1 MLJ 139, His Lordship Chang Ming Tat FJ approved the judicial approach taken by the High Court in that case, viz until and unless a plaintiff has discharged the onus on it to prove its case on a balance of probabilities, the burden does not shift to the defendant and no matter if the defendant's case is completely unbelievable, the claim against him must be dismissed.

[13] In the present case the defendant/appellant challenged the existence of all these three exhibits. It is therefore incumbent on the respondent/plaintiff to first establish that these three documents are genuine and represented the true transactions as alleged. In our view the learned JC misdirected herself when she states in her ground of judgment 'Dari alasan-alasan di atas saya telah putuskan yang D3, D4 dan P20 adalah dokumen yang gagal dibuktikan oleh defendan yang ianya dibuat secara frod. Maka D3, D4 dan P20 adalah dokumen-dokumen yang sah dan berkuatkuasa dan transaksi dengan mennggunakan D3, D4 dan P20 di dalam tindakan ini adalah transaksi yang benar dan sah disisi undang-undang dan kesahihan dokumen-dokumen tersebut tidak boleh dipertikaikan.' The learned JC had shifted the burden of proof on the defendant /appellant before ensuring that the plaintiff/respondent discharged his burden to prove that the exhibits in question exist and are genuine.

[14] We agree with learned counsel for the appellant that if the learned JC had properly appraised herself with the issues and evidence raised in relation to these documents she would have come to a different conclusion.

[15] We first turn to exh D3, the first document in issue in this case. Exhibit D3 is purportedly a deed of assignment ('DOA') dated the same date as the sale and purchase agreement ('SPA') ie 13 March 1996. The SPA is an agreed document where the four beneficiaries agreed to sell their respective shares to Nallayan. Exhibit D3 on the other hand, is a disputed document with the purpose as stated in the document 'to add up the rights of the purchaser', namely, Nallayan. The DOA seeks to assign to Nallayan the right to collect the proceeds of the 5/6 shares of the property for a period from 7 June 1993 to 13 March 1996. It is to be noted that the subject matter of the assignment

predated its execution date of 13 March 1996 as well as the date of the SPA, which confers the right over the 5/6 shares in the property to Nallayan. A

[16] Learned counsel for the appellant challenged the genuineness of exh D3 and submitted that the learned JC in finding that exh D3 is a genuine document failed to consider the following facts and evidence. B

[17] The respondent's case was that the DOA was drawn up by the same solicitor Ti Chin Lee and was executed on the same date of 13 March 1996 but the DOA never came to surface until the year 2010. The format of these two documents differs greatly in their appearances in that the SPA was typed written and the DOA is a computer print. The signing page of the SPA and the DOA came from the same typed written version (see core bundle tag 7 compared to core bundle tag 10). A comparison of these two documents would show clearly that the signing page of the DDA was annexed with a copy of the signing page from the SPA. The SPA makes no reference at all to the DOA and the stamping of the DOA was made 14 1/2 years later. C D

[18] Nallayan in his application to enter a caveat over the property on 5 February 1998 made no mention of the existence of the DOA. Both co-owners, Arumugam ('SD1') and Gnanasegaran ('PW2') testified at the trial that they never executed exh D3. E

[19] Exhibits D4 and P20 (see Tab 11 and Tab 12 of the core bundle) are also fraught with the same kind of discrepancies and irregularities as exh D3. The following evidence was disclosed. Exhibit D4 is a sale and purchase agreement dated 18 January 2000. It purports to sell Nallayan's 5/6 shares to the respondent at a consideration of RM400,000. Exhibit P20 is a deed of assignment of even date, that is, 18 January 2000 with exh D4. Under exh P20 Nallayan had purported to assign to the respondent the right to collect all proceeds for the 5/6 share in the property which was outstanding since 7 June 1993. F G

[20] It must be borne in mind that when Nallayan filed a suit against the appellant in the year 2000, about nine months after the purported sale of his 5/6 share of the property to the respondent, who is his nephew, exhs D4 and P20 were never produced in court in that suit. More importantly if these documents indeed existed at the time Nallayan filed his 2000 suit, he no longer would have any beneficial interest in the property to maintain a locus standi to file the claim against the appellant. Yet in his testimonies Nallayan when asked why these documents were not produced before the court blamed his solicitors who allegedly advised him that these documents were not important to the suit. H I

[21] It is pertinent to note that, despite the allegation that both exhs D4 and P20 were purportedly executed on the same day, that is, 18 January 2000, exh D4 was produced to be witnessed at the Temerloh Sessions Court while exh P20 was produced to be witnessed by a commissioner of oath, N Senggodan. exh P20 only came to light in the year 2010 and it was also never disclosed at Nallayan's 2000 suit. Exhibit D4 was never factored into the settlement agreement dated 25 July 2006. Nallayan admitted during the trial that exh P20 was never given to the appellant nor did he inform the appellant of its existence.

[22] It was when the appellant applied to remove the caveat on the property that the respondent obtained a court order vide High Court Originating Summons No S5–24–2643 of 2007 to preserve the caveat using exh D4 which came to light only in 2007, about eight years after the alleged purchase of the 5/6 share on 18 January 2000.

[23] It is also peculiar that the respondent as the owner of 5/6 share in the property never insisted for Nallayan to remove the caveat lodged since 5 February 1998 (see exh D2 tab 14 of the core bundle).

[24] If it is true that Nallayan had disposed all his shares to the respondent on 18 January 2000 vide exh D4 then he would not have any capacity to file a civil suit at the Kuala Lumpur High Court Suit vide No D5-22–1669 of 2000 on 8 September 2000. Further to that Nallayan and the respondent admitted that exh D4 was never disclosed to the Inland Revenue Board and no Real Property Gains Tax was paid in respect of the alleged transaction involving RM400,000.

[25] We agree with the submission of learned counsel for the appellant that had the learned JC took into account these unexplained discrepancies and irregularities she would not have concluded that these exhs are genuine and are the true representations of the transaction between parties. In our view and in line with the decision of the Federal Court in *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok*, the burden to establish fraud by the appellant had not arisen in the circumstances of this case because the respondent/plaintiff had not discharged his burden to establish his case premised on the exhs D3, D4 and P20. These exhs, which form the basis of the respondent's claim, are too tainted with unexplained discrepancies and irregularities that could lead to an inference that their genuineness may be in doubt.

[26] It is the respondent's case that exh D3 was prepared by the same solicitor Ti Chin Lee at his Bentong Office, who was also the solicitor who prepared the SPA dated 13 March 1996 signed by all the signatories on the same day before the said solicitor. Its genuineness would be in question if and when exh D3,

which is said to be contemporaneous to the SPA dated 31 September 1996, are made from different prints and when its signing page appear to have been inserted with the signing page of the SPA. Gnanasegaran ('PW2') testified he only sign one document while Arumugam DW1 testified he never executed the DOA but only signed the SPA. DW1 also said he only saw exh D3 for the first time in October 2010. He denied assigning any right to the Nallayan and claimed that his signature had been inserted in the signing page of exh D3.

[27] A letter of demand dated 5 December 1996 by the solicitor for the respondent made no mention of the DOA (exh D3). At the trial of the suit filed by Nallayan, which dragged for six years, there was no disclosure that exh D3 existed at the point when the settlement agreement dated 25 July 2006, was executed. Further to that exh D3 was never pleaded in the statement of claim by the respondent. The learned JC appeared to have overlooked these facts in finding that exh D3 was a valid document in the light of the evidence referred to above.

[28] We agree with learned counsel for the appellant that if the DOA (exh D3) was prepared by the same solicitor who also prepared the SPAI of even dates, these discrepancies, which brought about suspicion, would not have arisen. The failure of the respondent to call the solicitor to testify on these documents despite informing the appellant in writing that he would be present to testify, in our view attract the invocation of s 114(g) of the Evidence Act 1950 against the respondent. There was no explanation being offered by the respondent as to his failure to call this material witness despite notifying the appellant in writing that he would procure the attendance of Ti Chin Lee as witness at the trial. It would be imperative upon the respondent to call the material witnesses he had undertaken to do in writing, and the failure to do so without explanation could lead to an adverse inference against the respondent. In the circumstances we agree with learned counsel for the appellant that the legal inference under s 114(g) applies against the respondent. The solicitor, Ti Chin Lee, if he had been produced before the court at the trial would surely be able to explain the mystery of exh D3.

[29] The next disputed document is exh D4, which is the sale and purchase agreement for Nallayan's 5/6 shares to the respondent. Exhibit D4 is dated 18 January 2000 wherein a purchase consideration of RM400,000 was made. Nallayan initiated a civil action against the appellant vide Kuala Lumpur High Court No D5–22–1669 of 2000 filed on 8 September 2000. In that suit Nallayan sought for audited accounts of rental and proceeds from the property. It is to be observed that by exh D4 Nallayan had sold off his 5/6 shares in the property to the respondent. That being the case, what could have been the

capacity of Nallayan in filing the suit against the appellant? Furthermore in his pleaded case in that suit, he did not plead exh D4 and how could he even say the exh D4 was not important?

[30] While the suit was pending Nallayan was adjudicated a bankrupt on 13 August 2002. On 25 July 2006 Nallayan withdrew the action and entered into a settlement agreement dated 25 July 2006 where the appellant agreed to sell his 1/6 share to the respondent. We also find it peculiar that Nallayan could have withdrawn the suit and entered into a settlement agreement considering his lack of capacity as an undischarged bankrupt.

[31] On 1 December 2006 the respondent entered a caveat which he admitted during the trial was done on the instruction of Nallayan a/l Ramasamy. When the appellant tried to remove the caveat the respondent then produced exh D4 for the first time. This came to light in 2007, almost eight years after the alleged purchase took place on 18 January 2000. The commissioner for oath can explain the facts surrounding exh D4 and P20 (see *Caley Ototo Worldwide Sdn Bhd v Sun Wen Long* [2009] 9 MLJ 1; [2010] 1 CLJ 725) but as in the case of the solicitor he was not called to give evidence. The court is entitled to have the best evidence before it and the appellant was justified in imploring this court to invokes s 114(g).

[32] In view of the various issues raised in relation to exhs D3, D4 and P20 we are inclined to agree with the submission of learned counsel for the appellant that the learned JC had in coming to her findings overlooked or did not give due consideration to the facts and evidence referred to above. We find that the learned JC failed make any adverse inference against the respondent under s 114(g) for failure to call three material witnesses namely, the solicitor Ti Chin Lee, the officer of the land office to verify P7, which is a copy of exh D4 and the commissioner of oath, S Senggodan, to throw light into the mysterious existence of the three disputed exhs despite stating in writing that these witnesses will be called to testify.

[33] The Federal Court in *Jaafar bin Shaari & Anor (suing as administrator of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 4 CLJ 509 clarified the legal position in relation to document as evidence in this way:

> First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling eg, their makers.
>
> Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.

Thirdly, such documents therein do not form automatically a part of the evidence of the case in question ipso facto, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at anytime before the conclusion of the case.

Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, inter alia, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, eg, either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the documents including any 'written hearsay' contained therein. The court, may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate for reasons for such refusal.

[34] Applying the principle laid down in *Jaafar Shaari* and having perused through the appeal records we find that the respondent had failed to establish on the balance of probabilities that the three exhibits in question are all genuine and they truly represented the true transaction between parties. In other words, the respondent had not proven his case.

[35] We find the learned JC had fallen into error in upholding these documents as genuine and shifted the burden of proving fraud on the appellant/defendant.

[36] We therefore allowed the appeal of the appellant and set aside the orders of the High Court and consequently we allowed the counterclaim of the appellant. We allowed costs at RM75,000 here and below to the respondent with the deposit be refunded to the appellant.

Appeal allowed with costs of RM75,000.

Reported by Kanesh Sundrum